IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 342

BLAZEY CZAPLICKI,

Petitioner,

—v.—

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OLVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.

Respondents.

BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 56-60) is reported at 223 F. 2d 189, 1955 A. M. C. 1192 (2 Cir. 1955); the opinion of Hon. Sidney Sugarman, *U. S. D. J.* (R. 33-35) is reported at 110 F. Supp. 933, 1953 A. M. C. 206 (S. D. N. Y. 1952). The opinion of Hon. Henry W. Goddard, *U. S. D. J.* (R. 42-47) is reported at 133 F. Supp. 358 (S. D. N. Y. 1953). The opinion of Hon. Sylvester J. Ryan, *U. S. D. J.* (R. 14) is not officially reported. The granting of the petition for certiorari is reported at 350 U. S. 872, 76 S. Ct. 118, ——— L. Ed. ——— (1955).

Jurisdiction

The judgment of the Court of Appeals was entered May 23, 1955. On June 7, 1955 a petition for rehearing was filed with the Court of Appeals. The petition for rehearing was denied June 14, 1955. On August 23, 1955 the petition for writ of certiorari was filed and was granted October 24, 1955. The jurisdiction of this court is found in 28 U. S. C. 1254(1) and 2101(c).

Questions Presented

1. Whether or not the Court of Appeals decided an admiralty case properly on the defense of laches, where the issue was not passed upon by the judges of the District Court who ruled on various facets of the case and no hearing was had on the issue?

2. Whether or not a longshoreman is barred from maintaining an action in admiralty against third parties by the provisions of 33 U. S. C. §933 relating to the statutory assignment of his cause of action to his employer's insurance carrier, where he is forced to file a claim petition shortly after his accident and while he is still incapacitated and his employer's insurance carrier controverts his claim for the purpose of forcing him to elect between compensation and his third party recovery, it appearing without the knowledge of the longshoreman, that the employer's insurance carrier is also the liability carrier for the third party primarily responsible for the accident?

3. Whether or not a court of admiralty, applying equitable principles can reassign a cause of action to a longshoreman where it appears that the employer's insurance carrier, because it insures the third party primarily re-

sponsible, is unable to prosecute the joint interest it has in trust in the third party cause of action

4. What are the characteristics required of an "award" under 33 U. S. C. §933 to make it operate as a statutory assignment of a third-party cause of action?

Statutes Involved

LHCA 33 U.S.C.A. §914 provides in part:

> "Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.
>
> * * * * * * *
>
> (d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.
>
> * * * * *
>
> * * * Mar. 4, 1927, c. 509, § 19, 44 Stat. 1435, as amended June 25, 1938, c. 685, § 9, 52 Stat. 1167; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. * * *"

LHCA 33 U.S.C.A. §919 provides in part:

> "Procedure in respect of claims. (a) Subject to the provisions of section 913 of this chapter a claim for

compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee. * * * "

LHWCA 33 U.S.C.A. §933 provides in part:

"933. Compensation for injuries where third persons are liable. * * *

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

* * * * * *

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all

benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

* * * * *

* * * Mar. 4, 1927, c. 509, §33, 44 Stat. 1440, as amended June 25, 1938, c. 685, §§12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, §3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, §1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat.—* * *"

New York Civil Practice Act, Sec. 13 provides:

"§13. Limitation where cause of action arises outside of the state. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. Where such cause of action, whether originally accrued in favor of a resident or non-resident, arose in a foreign country with which the United States or any of its allies was then or subsequently at war, or in territory then or subsequently occupied by the government of such foreign country, the period between the commencement of the war, or the occupation of such country, and the termination of hostilities with

such country, or the termination of such occupation, is not a part of the time limited in this article for commencing the action; provided, however, that nothing herein or in this article shall apply to or be deemed in any manner to affect any action under section six hundred twenty-five of the banking law against a banking organization or against the superintendent of banks. (Code 390-a. Am. L. 1943 ch. 516, April 15.)"

New York Civil Practice Act, Sec. 19 provides:

"§19. Effect of defendant's absence from state or residence under false name. If, when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

1. While a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.

2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

(Am. L. 1928, ch. 809, Sept. 1; L. 1943, ch. 263, Sept. 1; Code §401.)"

New York Civil Practice Act, Sec. 48 provides in part:

"§48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued;

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article."

New York Civil Practice Act, Sec. 53 provides:

"§53. Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the case of action accrues. (Code §388.)"

N.J.R.S. provides:

"2A:14-22:

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such

corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

Statement

This case involves an affirmance on an appeal of the orders and decrees of three judges of the District Court. Petitioner instituted the present action by a libel in two counts, one for negligence and one for unseaworthiness.

Libelant alleges that on September 6, 1945, he was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, New Jersey, and was loading the SS HOEGH SILVERCLOUD. During lunch hour the carpenters had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on them. The carpenters were not connected with his employer, but were working for a separate carpenter company, the Hamilton Marine Contracting Company (R. 12-19; R. 25-27). This company is covered for liability by Travelers Insurance Company which is also the compensation carrier (R. 26).

The libelant in his affidavit filed in this action stated that he injured his left side, left thigh, left elbow, right leg, and left testicle in this accident. After the compensation carrier's doctor completed treatment and refused to treat him any more he went to other doctors and in August of 1946 his left testicle was removed. He states he has not worked since (R. 26).

The records of the compensation commission show that libelant had filed a claim dated September 27, 1954 (Li. Ex. 1, R. 66A), that an "award" was made on September 28, 1945 (Li. Ex. 2, R. 68), that the report of the employer dated September 6, 1945 (Li. Ex. 3, R. 70A) described the accident: "Man was ascending steps to get over catwalk to #1 hatch. Steps were not fastened and they carried away—man fell and bruised right leg and left thigh."

A notice that the claim would be controverted was filed on September 17, 1945, on behalf of the insurance carrier for the reason that the claimant was "undecided whether or not to sue the third party." A memorandum by the claims examiner states that compensation payments were withheld by the carrier "because of the possibility of the injury having been caused by the negligence of a third party" (Li. Ex. 4, R. 72).

The deposition of Travelers Insurance Company disclosed that in their file in answer to the question "Is the right of subrogation involved?" the answer of "yes" is given (Li. Ex. 7 at p. 7). It also appears from their file that claimant appeared at the insurance company office on September 17, 1945, that he was undecided as to whether he should sue or accept compensation, that he spoke a "broken English," that Hamilton Marine Company and Kerr Steamship Lines were the parties against whom a "subrogation" claim might be asserted.

In the unsigned statement of libelant in the Travelers file appears the following:

> "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I don't want to bother to sue anybody" (Li. Ex. 7 at p. 10).

Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the employers of the carpenters.

In the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945, a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties (R. 19-20).

On December 29, 1952, the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U.S.C. §933(b) (R. 37). [This is a provision of the Longshoremen's and Harbor Workers' Compensation Act, hereafter referred to as the LHWCA.]

The other respondents, SS HOEGH SILVERCLOUD, Oivind Lorentzen as Director of Shipping and Curator of The Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

Section 933(b) of the LHWCA by its assignment provision, as construed by Judge Sugarman, made the said Travelers Insurance Company, in effect, the trustee of the cause of action in which libelant and the said Travelers Insurance Company jointly had an interest.

Because of the conflict of interest of the effective trustee of this action, the libelant appealed to the traditional powers of the court to protect his rights and to do justice, and he made application to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. on the ground that

the true party in interest cannot take advantage of its own default in failing to sue as trustee of the cause of action (R. 38-41).

Furthermore, libelant made application to the court to make the Travelers Insurance Co. a party to this action and to compel Travelers Insurance Co. to sue in its own behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or for an order requiring Travelers Insurance Co. to reassign said cause of action to the libelant because of conflict of interest, and to do justice to the libelant herein.

Judge Goddard denied this motion, holding that the statutory assignment was absolute in the absence of fraud (R. 42-47).

The case then came on to be heard by Judge Ryan who limited the hearing to and dealt solely with the defense of statutory assignment. Judge Ryan decided the case on the ground that the law of the case had been settled by the two opinions rendered heretofore, and he dismissed the libel as to all remaining parties (R. 11).

Libelant appealed from all rulings.

On appeal the Court of Appeals discussed the question of the statutory assignment under 33 U.S.C. §933 which was the only ground considered by the courts below and indicated that it did not agree with the determination on this issue, but stated that the case didn't have to be decided on this issue because the libelant was barred by laches (R. 56-60). This latter ground had not been developed in the District Court.

Libelant petitioned for a rehearing, but the petition was denied (R. 61-64). This court has allowed certiorari (R. 65).

Summary of Argument

1. The cause of action of libelant was not assigned to the libelant's employer and compensation carrier because the alleged "award" was not such an "award" as would effectively transfer the cause of action under Section 933. It was not a final determination. It did not result from a *bona fide* controvertion of libelant's claim, but was the result of withholding libelant's compensation payments for the sole purpose of forcing him to abandon his third party claim to the very insurance carrier who insured the third party responsible for the accident. In addition it did not follow from the regular procedure for an "award" set forth in the LHWCA.

2. If there was a valid assignment, the District Court sitting as a Court of Admiralty should have permitted libelant to implead the compensation carrier and should have made the compensation carrier a party to the action under such protective orders as might be necessary under the circumstances. In the alternative the court could have directed the compensation carrier to reassign the cause of action to libelant on terms it deemed just.

3. The Court of Appeals affirmed the dismissal of the libel on the defense of laches. It did not affirm on the ground of statutory assignment. Since the trial court made no finding as to laches and since laches is a question to be determined after all the evidence is before the court and the equities are weighed and balanced, this deprived libelant of his day in court on this issue.

4. The LHWCA was not intended to deprive longshoremen of their rights against third party tortfeasors. The assignment provisions of this act were only intended to permit the employer of the longshoremen to recoup the payments made under LHWCA where the injury was due

to the acts or omissions of a third party. It was not intended to provide insurance companies with an easy way to deprive longshoremen of their rights against third parties. The courts, giving the LHWCA the liberal interpretation to which it is entitled, should protect the rights of longshoremen in such situations as the present one, applying the broad equitable principles traditionally employed in admiralty.

POINT I

Where a compensation carrier under the LHWCA is the insurer of the third party responsible for an employee's injury, the Court of Admiralty will intervene to protect the interests of the injured employee because of the inablity of the compensation carrier which has a conflict of interest to fulfill its obligation as trustee of the cause of action.

(a) *A court of admiralty applies equitable principles.*

In *Toledo S.S. Co.* v. *Zenith Transportation Co.*, 184 F. 391 (1911) the libelant sought to invalidate an award on the ground that it had revoked its arbitration consent before an award had been made and published. The court rejected the narrow common law view. Among other things Judge Hollister stated at page 399:

> "But this suit is in admiralty, a branch of the law not hampered by the rigid rules of the common law and which deals with causes upon considerations even more elastic than pertain to the broad jurisdiction of Courts of Chancery. * * *"

In *The Kongo*, 155 F. 2d 492 (6 Cir. 1946) cert. den. 329 U.S. 735, 67 S. Ct. 99, 91 L. Ed. 635 (1946), the libelant sought to recover unpaid seamen's wages which he had paid and for which he had assignments. The court held that the libelant could not use a corporate fiction to con-

ceal his own obligation. Among other things Judge Allen stated at page 495:

> " * * * A fraud would result if McBride's representative could collect from third parties the debts which he obligated himself to pay. Such a result would violate the underlying principles of admiralty proceedings, for while admiralty courts do not have general equitable jurisdiction, they have capacity to apply equitable principles in order the better to attain justice. Schoenamsgruber v. Hamburg Line, 294 U.S. 454, 457, 55 S.Ct. 475, 79 L.Ed. 989. Or, as stated by Mr. Justice Story in Brown v. Lull, 4 Fed. Cas. pages 407-409, No. 2,018: 'they (admiralty courts) act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.'"

In *United Fruit Co.* v. *United States*, 186 F. 2d 890 (1 Cir. 1951) it was held that a redelivery certificate which purported to be a receipt for a vessel and a release of claims was not binding under the circumstances in that case. Among other things Chief Judge Magruder stated at page 896:

> " * * * A court of admiralty, in cases within its jurisdiction, proceeds upon equitable principles; and if a release is pleaded in defense against a libel in admiralty on a maritime contract, the admiralty court has power to disallow such a defense where under the circumstances the libelant would be entitled to relief by way of rescission or reformation of the release under accepted equitable principles. * * *"

In *Gardner* v. *Dantzler Lumber & Export Co., Inc.*, 98 F. 2d 479 (5 Cir. 1938) Judge Foster stated at page 479:

> " * * * Indeed, the presumption must be indulged that R. C. Gardner put the legal title of the vessel

in his insolvent brother to avoid liability for possible claims arising from her operation. Courts of admiralty administer the broadest equity and may look through such transactions to ascertain the truth."

See also *Rice* v. *Charles Dreifus Co.*, 96 F. 2d 80, 82 (2 Cir. 1938); *The Salvore*, 36 F. 2d 712, 713 (2 Cir. 1929); *Gaynor* v. *The New Orleans*, 54 F. Supp. 25, 28 (N.D. Calif. 1944).

The fact that admiralty applies equitable principles has been recognized by textbook writers on the subject. 1 Knauth *Benedict on Admiralty* (Sixth Ed. 1940) Sec. 71 and the Supplement thereto (1955); Norris *The Law of Seamen* (1951) Sec. 501; Robinson *Handbook of Admiralty Law* (1939) Sec. 22.

(b) *The carrier for libelant's employer had a special "trust" relationship with libelant with regard to the cause of action arising from libelant's injury.*

Judge Sugarman dismissed the libel as to the respondent Kerr Steamship Company, Inc. on the ground that there had been an effective assignment of libelant's cause of action (R. 35). Judge Goddard refused to strike the defense of Hamilton Marine Contracting Company, Inc. based on the defense of a statutory assignment and refused to make Travelers Insurance Company a party to the action or to require them to reassign the cause of action to libelant (R. 42). Judge Goddard held that only with a showing of "fraud" libelant might have a remedy against Travelers Insurance Company (R. 46). Judge Ryan, following the decisions of his brother judges, dismissed as to remaining respondents on the same ground (R. 53).

The LHWCA specifically recognizes a "trust" relationship in one situation. If the employer makes a recovery on an assigned cause of action against the third-party tortfeasor in excess of his lien and the attorney's fees,

then the deputy commissioner is to compute future benefits and the employer is to retain the amount computed "as a trust fund to pay such compensation" 33 U.S.C. 933(e) (1) (d). This illustrates the nature of the relationship created by an assignment under the LHWCA.

In *United States Fidelity & Guaranty Co. v. United States*, 152 F. 2d 46 (2 Cir. 1945) a longshoreman had been paid compensation by libelant, his employer's compensation carrier, for personal injuries received on respondent's vessel while in the course of his employment. The respondent sought to set aside a decree on several grounds. Among other things it claimed that because it had paid the premiums which had insured plaintiff's employer for liability against workmen's compensation the insurance carrier should not recover. Judge Learned Hand disposed of this contention by saying at page 48:

> " * * * So far as concerns the tortfeasor's liability up to the amount of workmen's compensation, while it may be a good answer as between the employer and himself that the insurance has protected the employer, it is no answer to the insurer, because it ignores his right of subrogation, which is an incident to his contract of insurance. So far as concerns the tortfeasor's liability to the employee beyond the amount of workmen's compensation, no agreement between the tortfeasor and the employer can prejudice the employee, because, although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, *the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.* Certainly he may not in advance release the whole claim upon consideration

that he shall be personally released from his liability for workmen's compensation. * * *" (Italics ours.)

The Court of Appeals in this case sustained the dismissals below on the ground of laches, a ground not determined by the District Court. However, as to libelant's contention that a trust relation existed, Judge Frank, speaking for the court, quoted part of Judge Hand's language set forth above and then stated with respect to this case at (R. 59):

> "The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party."

In the United States District Court, the "trust" theory was rejected on the basis of *Hunt* v. *Bank Line*, 35 F. 2d 136 (4 Cir. 1929) (R. 44).

The *Hunt* case is an early case under the LHWCA. It was decided before Section 933 was amended, clarifying the intent of Congress not to make the rights of an injured employee under the LHWCA and his rights against third parties mutually exclusive. See *Grasso* v. *Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1944), aff'd 149 F. 2d 127 (2 Cir. 1945) cert. den. 326 U.S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

This Court has indicated that the question presented in that case is still an open one. In *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 53 S. Ct. 231, 77 L. Ed. 477 (1933), the plaintiff was the employer's compensation carrier who had paid the employee's widow under an award. The carrier then sued in its own right and also to the use of the widow in her own right and as administratrix. Chief Justice Stone, speaking for the court, stated at page 543:

"Accordingly the employer is the party to bring the action and the only necessary party plaintiff in case before us. But the insurance company and the widow, both in her own right and as administratrix; are interested in the recovery. Under the common-law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. * * * Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have 'an interest * * * in obtaining the relief demanded' we do not decide. * * * Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare Hunt v. Bank Line (C.C.A.), 35 F. (2d) 136; or the insurer * * * in a case where the employer refused to co-operate in the prosecution of the action."

The theory advanced in the *Hunt* case that the employee in accepting compensation, in effect, chose between a remedy against one of 2 joint-tortfeasors is not analogous. The remedy of the employee under the LHWCA is not based on wrongdoing. It arises from the employer-employee contractual relationship. The employee's benefits under the act are generally much less than the damages given in regular tort actions. Cf. *Crab Orchard Imp. Co.* v. *Chesapeake and Ohio Ry. Co.*, 115 F. 2d 277 (4 Cir. 1940), cert. den. 312 U. S. 702, 61 S. Ct. 807, 85 L. Ed. 1135 (1941).

Furthermore, the *Hunt* case disregards the liberal intent of the LHWCA repeatedly announced by this Court. See *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Doleman* v. *Levine*, 295 U. S. 221, 55 S. Ct. 741, 79 L. Ed. 1402

(1935); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408, 52 S. Ct. 187, 76 L. Ed. 366 (1932).

Christon v. United States, 8 F. R. D. 327 (D.C.E.D. Penna. 1947) while brought on the law side of the calendar applied equitable principles in a maritime law case. In that case the injured employee had elected to sue the vessel instead of accepting compensation. The insurance carrier for the employer sought to intervene. The respondent owner of the vessel, had moved to implead the employer on the ground that the employer would be liable to it for any liability found against it in the suit by the employee, which motion was granted. Judge Fitzpatrick then stated at page 328:

> "Now, if the Casualty Company's policy protests Maritime against claims of this nature, the Casualty Company would benefit by keeping the verdict against Maritime down to a figure no higher than the amount of compensation due the plaintiff administratrix under the Longshoremen's Act. It would in any event be liable for the full amount of that compensation. Its interest, to this extent, would be against that of the plaintiff and in accord with that of Maritime and, from this point of view, it should be aligned with the two respondents.
>
> *Obviously the Casualty Company may not take a dual position.* The only way that it might properly be a party plaintiff would be if Maritime were not impleaded and the suit were to proceed against the United States. As the suit stands, its motion to intervene will be denied." (Italics ours.)

Section 933 was not intended to give an unconscionable benefit to the insurance company for the employer. On the contrary, it imposed a trust upon such carriers. In *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545, Chief Judge Cardozo stated at page 546:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rules of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

In *Saco-Lowell Shops* v. *Reynolds*, 141 F. 2d 587 (4 Cir. 1944), Judge Parker in contract licensing case stated at page 597:

> "* * * As said in the case cited, quoting from the note of Judge Hare in 1 Leading Cases in Equity 62: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'"

In the present case the respondent's insurer procured a formal award approximately 3 weeks after libelant's accident. Libelant had no knowledge of the conflict of interest possessed by respondent's insurer (R. 26). He is an ordinary longshoreman who only knew of his own need at the time.

The injustice of the *Hunt* case, where it develops that the employer's insurance carrier is on both sides of the fence, is shocking and runs counter to the most elementary

concepts of fair dealing. The cause of action was assigned to the employer under the LHWCA to enable the employer, who often is without fault, to recoup his losses under the LHWCA occasioned by the act of another. In order to avoid disputes the Act gives the employer a wide range of discretion relative to the third-party cause of action. Normally, we may assume, the employer's self-interest would cause him to act on behalf of himself and his employee. However, when the employer is no longer in a position to do this because those who control the litigation find themselves on both sides of the fence, the employer or his insurer, at the very least, have the duty to inform the employee before he makes an election that he, by taking compensation under an award, is forever renouncing all chance for any further recovery. Even if such notice is given, the very duality of the position of the carrier for the employer should forever estop it from asserting the defense of Section 933?

The compensation carrier did not controvert libelant's claim for compensation because there was any legitimate question concerning libelant's right to compensation at the time. Rather it was for the purpose of compelling the libelant to give up his rights to compensation and medical treatment or his cause of action against third-party tort feasors (Li. Ex. 4, R. 72; Li. Ex. 7 at p. 10). Section 914(a) requires that compensation be paid promptly without an award, "except where liability to pay compensation is controverted by the employer." 33 U. S. C. 914(a). In this case, the insurance carrier did not controvert liability. It merely sought to use the device of a formal award to compel the libelant to assign his cause of action at a time when he was in economic need because of his injury. This is clearly set forth in the memorandum of the claims examiner which is dated September 28, 1945, the date of the award and upon which the respondent relies to show that libelant made an election (Res. Hamilton's Ex. A, R. 74).

(c) A court of admiralty applying equitable principles will protect the interest of a longshoreman in a cause of action he has against a third-party tortfeasor which is held by his employer or his employer's carrier in their joint interest.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, —— U. S. ——, 76 S. Ct. 232, —— L. Ed.—— (1956) this Court held that a third-party tortfeasor could recover from a a stevedore's employer the amount paid for injury to the stevedore on the basis of an implied consensual obligation under certain circumstances. Mr. Justice Black, with the concurrence of the Chief Justice, Mr. Justice Douglas, and Mr. Justice Clark, dissented. Among other things Mr. Justice Black stated at page 243 of the Supreme Court Reporter:

> "* * * Human nature and habits being what they are, employers will not be eager to finance suits against themselves. Injured longshoremen are not ordinarily wealthy enough to support themselves without work pending the trial of lengthy lawsuits. Yet if an employee accepts a compensation award only his employer can bring suit against the third person, and the employer will not be overly anxious to sue himself. *It has been suggested that we can expect the courts to protect employees under such circumstances.* In other words, the employee who has accepted compensation must go into court to protect himself against his employer before he goes into court to protect his claim against a third party who has negligently injured him. I cannot believe Congress would have given employers such complete control over these suits if it had thought the employers could be held liable for everything recovered. * * *" (Italics ours.)

This case is a perfect example of a situation where an employee needs protection. The apparent purpose of Sec-

tion 933 is to give the employer a chance to recoup his losses not to destroy the rights of the injured longshoreman against third-party tortfeasors. Congress apparently assumed that the normal self-interest of the insurance carrier or the employer would be sufficient to entice them to pursue the injured employee's cause of action against third party tortfeasors.

The District Court had power to add the insurance company of the employer and third-party tortfeasor to this action. Rule 15 of the Admiralty Rules of the United States District Courts for the Southern and Eastern Districts of New York provides:

"Rule 15—Substitution of Parties

When by reason of the death or incompetency of any of the parties, changes of interest in the suit, defects in the pleadings or proceeding, or otherwise, new or substituted parties to the suit are necessary or proper, persons, upon their own petition or upon petition of any party to the cause, may be made parties by appropriate order ex parte if no appearance or claim has been filed, otherwise the said application shall be made on notice to all parties who have filed appearance or claims. The order may provide for the issuance of process."

This rule was formerly Rule 18. It is now Rule 12. In *Syville* v. *Waterman S. Corp.*, 84 F. Supp. 718 (S. D. N. Y. 1949), Judge Coxe stated at page 719:

"Under either the Jones Act or the Death on the High Seas Act the personal representative of the deceased seaman is the only person who may maintain an action. * * * Anne cannot, as general guardian, maintain the action, nor can she, as administratrix, her letters

having been revoked, continue further to prosecute it. Elise, by reason of her appointment as administratrix, has succeeded to the rights of Anne as administratrix, and is now the only person who can continue the prosecution of the action, and, despite her objections, she must be made an involuntary libelant. I think that Rule 18 of the Local Admiralty Rules authorizes this. Under ordinary circumstances this relief would seem to be sufficient: But there is evident antagonism between Anne and Elise. However, the rights of the infant children to share in any recovery must be protected. Both Acts provide that the action shall be maintained for the benefit of both the widow and the children. And, under the Death on the High Seas Act, the words 'child, or dependent relative' have been held to include illegitimate children.

* * * Under Local Admiralty Rule 15 persons entitled to participate in the recovery may be admitted to prosecute as co-libelants. I think that under this Rule there is authority to add Anne, as general guardian of her children, as a co-libelant.

The motion is disposed of by directing that Elise, as administratrix, shall file within 20 days a second amended libel in which she shall be the libelant and Anne, as general guardian, co-libelant. In the event that Elise shall fail to do so, Anne, as co-libelant, may file such second amended libel in the names of Elise, as administratrix, libelant, and herself, as general guardian, co-libelant." (Citations omitted.)

Under the local admiralty rules, the District Court, applying equitable principles, could have provided for making the Travelers Insurance Company a party to the action and permitted the action to proceed on terms which would be just to all parties.

POINT II

The United States Court of Appeals should not have affirmed a dimissal on the issue of laches which was not determined by the Court below but should have remanded the case for further proceedings.

Judge Sugarman dismissed the libel as to the respondent Kerr Steamship Company on exceptions on the ground that there had been an effective assignment of libelant's cause of action. He deliberately did not consider the issue of laches (R. 35). Judge Goddard's opinion did not discuss laches either (R. 42). Judge Ryan decided the case on the ground that there had been an assignment, which had been established as the law of the case by his brother judges and therefore he dismissed the libel as to the remaining respondents (R. 11). At no time at the trial level was the case determined on the issues of laches. The trial before Judge Ryan dealt only with the assignment defense and did not go into the factual aspects of laches (R. 2). The Court of Appeals did not decide the assignment issue but instead disposed of the case on the ground of laches, without making any findings of fact concerning laches. The issue should have been determined after a hearing and after all the equities had been appraised and balanced. See *Taylor* v. *Crain*, 195 F. 2d 163, 165 (3 Cir. 1952); *United States* v. *Alex Dussel Iron Works*, 31 F. 2d 535, 536 (5 Cir. 1929); *Rederi A/B Gylee* v. *Sinason and Zeitlin*, —— F. Supp. ——, 1956 A. M. C. 164 (S. D. N. Y. 1955). Furthermore since the issue was not tried by the judges at the trial court level, the matter should have been remanded for further hearing and findings of fact. See *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525, 532, 58 S. Ct. 651, 82 L. Ed. 993 (1938); *Kreste* v. *United States*, 158 F. 2d 575, 580 (2 Cir. 1946); *Jackman* v. *United States*, 54 F. 2d 227 (1 Cir. 1931).

In *Gardner* v. *Panama Railroad Co.*, 432 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31 (1951) this Court stated at page 30:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * *"

See also *Loverich* v. *Warner Co.*, 118 F. 2d 690, 693 (3 Cir. 1941) cert. den. 313 U. S. 577, 61 S. Ct. 1104, 85 L. Ed. 1535 (1940). *The Slingsby*, 120 F. 748 (2 Cir. 1903) cert. den. *Whalley* v. *Travers*, 188 U. S. 741, 23 S. Ct. 844, 47 L. Ed. 678 (1903).

This accident occurred in New Jersey. The suit was instituted in the United States District Court sitting in New York. The courts of the State of New York would normally look to the applicable limitations period of the place where the accident occurred. N. Y. C. P. A. Sec. 13. In New Jersey the limitations period has not run because it has not been established that the respondents are residents or corporations of New Jersey or foreign corporations having any person or officer in New Jersey upon whom process may be served. See R.S. 2A:14-22, formerly R.S. 2:24-7 as am. L. 1949 c. 125 p. 495 § 1; *Kenny* v. *Duro-Test Corporation*, 91 F. Supp. 633 (D. C. N. J.); *Whalen* v. *Young*, 28 N. J. Super. 543, 545, 101 A. 2d 64, 66 (Law Div. 1953) reversed in part on other grounds as to other issues in 15 N. J. 321, 104 A. 2d 678 (1954).

The libel is based both on negligence and on unseaworthiness (R. 12 *et seq.*), the situation is similar to that in the

case *LeGate* v. *The Panamalga*, 221 F. 2d 689 (2 Cir. 1955). In that case libelant was injured on October 16, 1950 while employed as a longshoreman at Galveston, Texas. A libel was filed in New York about 3 years and 5 months later. The case was dismissed on the ground of laches on exceptions to the libel. Judge Burke, speaking for the Court of Appeals reversed and remanded the case, stating in part at page 690:

> "* * * The claim based upon negligence may not be barred under the Texas statute, because of the absence of the respondents from Texas. * * *"

Then at page 69; he stated:

> "Section 48, C. P. A. deals with actions which must be commenced within six years after the cause of action has accrued. Subdivision 3 thereof reads 'An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.' The only other express provision for a personal injury action is Section 49(6) relating to actions based on negligence. We hold therefore that as to the claim based on unseaworthiness the six-year statute, Section 48(3), C. P. A. is the analogous statute which should be considered in determining laches.
>
> We are not disposed however to mechanically apply the analogous state statutes of limitations without regard to the equities. See Gardner v. Panama Railroad Co., 342 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31. A rigid application would call for affirmance of the judgment in so far as it disposed of the claim based on negligence. Since we must reverse for the error in dismissing the claim based on unseaworthiness we think it would be a harsh result to permit the suit to continue and at the same time limit its scope. Accordingly we

reverse the judgment appealed from. We remand the case to the District Court with a direction to reconsider the question of laches, placing the burden on the respondents to show inexcusable delay in filing the suit with resulting prejudice to the respondents."

The respondent's vessel had been within the jurisdiction of the United States District Court, Southern District of New York once in 1946, twice in 1947, once in 1948, twice in 1950, and twice in 1951 (R. 32). Under N. Y. C. P. A. Sec. 19, an absence from the state of more than four months tolls the limitations period. Therefore it would appear that the analogous limitations period has never run as to the vessel. Libelant alleged in the libel that respondent Olvind Lorentzen, a citizen of Norway, had an office and place of business in New York. This respondent never filed an answer but did file exceptions (R. 51). The record does not disclose whether or not this respondent was present within the jurisdiction for a sufficient period of time for the analogous limitation period to have run as to him either. N. Y. C. P. A. Sec. 53 provides that where no other limitations period applies the limitations period is 10 years. *Pitcher* v. *Sutton*, 238 App. Div. 291, 264 N. Y. S. 488 (App. Div. 1933) aff'd 264 N. Y. 638, 191 N. E. 603 (1934).

After Judge Sugarman on the exceptions of respondent Kerr Steamship Company, Inc. held that libelant was not a proper party because his cause of action had been assigned to libelant's employer Northern Dock Co. and Travelers Insurance Company as the compensation carrier, libelant moved to add the Travelers Insurance Company as a party libelant, or to require the Travelers Insurance Company to reassign the cause of action to libelant. In addition libelant asked that the defense of assignment by respondent

Hamilton Marine Contracting Company, Inc. be dismissed on the ground that Travelers Insurance Company insured respondent Hamilton Marine Contracting Co. and was the true party in interest and should not be permitted to take advantage of its position as trustee of the cause of action which it held for itself and libelant (R. 38). This is essentially a request for equitable relief, and consequently would be governed by the ten year limitations period.

Furthermore it is possible that if the vessel and its owners were held liable the Travelers Insurance Company would be required to pay the full judgment. See *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corporation*, —— U. S. ——, 76 S. Ct. 232, —— L. Ed. —— (1956). The steps which were not fastened or secured and on which libelant was injured were put up by the employees of respondent Hamilton Marine Contracting Company (R. 25). This is the company insured for liability by the same Travelers Insurance Company.

This insurance carrier should not be permitted to benefit from its own failure to pursue the cause of action which it held as trustee for itself and the libelant.

In *McDaniel* v. *Gulf & South American Steamship Co.*, 228 F. 2d 189 (5 Cir. 1955) a longshoreman's libel was dismissed on exceptions. The dismissal was based on laches, the libel having been filed over four years from the date of accident, and over two years after the analogous state limitations period had expired. On appeal the case was reversed and remanded. Among other things Judge Cameron stated at page 191:

> "Courts of admiralty which act upon principles of equity are not bound by the applicable statutory limitations governing the bringing of actions at law in local courts to make a mechanical application of such

statutes but, by analogy, they will generally be guided by such statutory periods. The lapse or nonlapse of the statutory period of limitations is not, of itself, decisive, but is only one of various factors to be taken into consideration by the court. No arbitrary or fixed period of time will be established as an inflexible rule, but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. * * * "

Then at page 193 he stated:

"It is clear, moreover, that the libel avers that appellee has not been prejudiced by the delay. It is argued that prejudice would inevitably follow a delay such as is reflected here. We do not agree. As a practical proposition we know that a serious accident of the sort described in the libel would be fully investigated by the average person and no circumstance is suggested which would lead to the assumption that the usual procedure was not followed here. * * * "

The Travelers Insurance Company investigated this accident promptly. Its own files indicate that there was third-party liability. The basic facts concerning the accident are not seriously in dispute on the basis of their own records. Libelant's medical history is likewise a matter of record. It does not appear at the present time that respondents will be any worse off than they would have been two, four, or even six years ago with respect to proof on medical issues.

The Court of Appeals should have remanded the case for trial. Only after full trial when all the evidence is before the court, can there be a determination that respondents or any of them were prejudiced by the mere passage of time.

POINT III.

There was no award made within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 933(b) and therefore there was no assignment of the libelant's cause of action to his employer or his employer's insurance company.

Section 933(b) of the LHWCA provides for assignment of a cause of action against a third party to an employer where there is acceptance of compensation "under an award in a compensation order filed by a deputy commissioner." Prior to 1938 the mere acceptance of compensation with or without an award operated as an assignment. See *Grasso v. Lorentzen*, 56 F. Supp. 51 (S. D. 1944); 149 F. 2d 127 (2 Cir. 1945) cert. den. 326 U. S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

In *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947), the court stated at page 455:

> "Congress has provided that unless an employer controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue; save the general limitation of one year option. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think

that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor."

As stated by Justice Reed, the purpose of the amendment was to avoid pressuring a claimant into accepting an award while he was in need. Limiting the assignment provision to the situation where there is an "award" therefore must have a special significance in line with the intent of Congress. What, then, is an "award"?

An award is an order of a Deputy Commissioner made on a claim, after a hearing where a hearing is ordered, if requested, and if no hearing is ordered, then 20 days after notice is given to the employer. 33 U. S. C. A. §919 sets forth the only procedure by which an "award" is entered.

In the present action the claim was filed September 27, 1945 (Li. Ex. 1, R. 66A), notice to the employer is dated September 28, 1945 (Li. Ex. 3, R. 72), and the order with the alleged "award" is dated September 28, 1945 (Li. Ex. 2, R. 69). Therefore the order was not an "award" but was merely an order. There had been no hearing and no 20 day period had elapsed from the date notice had been given to the employer. The failure to follow the statutory requirements resulted in denying the order the dignity of an "award." In *American Mutual Liability Insurance Co.* v. *Lowe*, 13 F. Supp. 906 (D. C. N. J. 1936) the claimant had received an alleged award on May 3, 1932. Over 2 years later claimant moved for an additional award which was granted. The claim was made that the award of May 3, 1932 had disposed of claimant's rights. Judge Fake stated at page 906:

"The action before the deputy commissioner proceeded under section 21 of the aforesaid Act (U. S. C. title 33, §921 (33 U. S. C. A. §921)) which provides: (a)

was brought against the respondents. On July 29, 1952, exceptions and exceptive allegations were filed on behalf of Kerr Steamship Co., Inc. on the grounds of (1) petitioner's laches, and (2) because he had received a formal compensation award and was an improper party to bring suit, the case having been assigned to his employer by Section 933(b) of Title 33 U. S. C. At the time of the argument of these exceptions and exceptive allegations before the Honorable Sidney Sugarman, the entire compensation file was subpoenaed from the Commission. Included within the file are all the papers marked exhibits herein and in addition a letter of September 25, 1945 from Claims Examiner, O'Keefe, to the petitioner explaining his rights. This is made a part of the appendix to this brief (pp. 1a-5a).

By memorandum of law filed with the Court at the time of the argument of the exceptions and exceptive allegations, the question was also raised that the formal compensation award of September 28, 1945 was final insofar as judicial review was possible since more than thirty days had elapsed since its filing citing 33 U. S. C. Sec. 921(a), (b) and (d). After hearing argument on the exceptions, Judge Sugarman handed down a memorandum opinion (Petitioner's Appendix, p. 1a), sustaining the exceptions based on the formal award. Meanwhile, the time of the respondent, The Norwegian Shipping and Trade Mission, to answer was kept open by stipulation. Subsequently petitioner moved for further relief seeking (1) to strike the defense of Hamilton Marine Contracting Company, Inc., that an assignment had been made, or (2) to add the Travelers Insurance Company as a party, or (3) to order Travelers Insurance Company to assign the cause of action back to petitioner. In an opinion filed by Judge Henry W. Goddard November 30, 1953, the motion was denied in all respects (Petitioner's Appendix, p. 6a).

Subsequently, it was agreed that all parties would appear before the Court for hearing as to whether or not the case

would be dismissed as to The Norwegian Shipping and Trade Mission and Hamilton Marine Contracting Co., Inc. on the same grounds that it was dismissed as to Kerr Steamship by Judge Sugarman, to wit, that there had been an award and assignment of the claim to petitioner's employer. After a hearing Judge Ryan followed the decision of Judge Sugarman of December 11, 1952 and dismissed the libel as to the two remaining parties.

In its opinion dated May 23, 1955 the Court of Appeals affirmed the dismissal of the libel. Petition for a rehearing was made and on June 14, 1955 denied.

There is no claim that either The Norwegian Shipping and Trade Mission or Kerr Steamship Company, Inc. is in any way associated with the Northern Dock Company, the Travelers Insurance Company or Hamilton Marine Contracting Co., Inc.

ARGUMENT

1. This Court has no jurisdiction to review the compensation order or award.

In so far as the petition attacks the award or compensation order of September 28, 1945, said attack is collateral and neither the District Court, the Court of Appeals nor this Court has any jurisdiction to review said award.

Section 921(a) and (b) of Title 33 are specific as to the procedure to be followed for review. Suit is to be commenced in the District Court where the accident occurred (New Jersey, not New York), within 30 days after the filing of the compensation order and shall be brought against the Deputy Commissioner. None of these requisites have been followed.

Section 921(b) expressly provides that this is the exclusive method of review.

The courts have construed this statute strictly.

Crowell v. *Benson*, 285 U. S. 22, 63.
Associated Indemnity Corporation v. *Marshall*, 71 F. (2d) 235, 236 (9th Circuit).
Shugard v. *Hoage*, 89 F. (2d) 796, 797, 798. (Court of Appeals, District of Columbia.)

Failure to proceed according to the statute, in any particular is a jurisdictional defect in any other proceeding.

Hagens v. *United Fruit Co.*, 135 F. (2d) 842. (Failure to sue Deputy Commissioner.)
Mille v. *McManigal*, 69 F. (2d) 644. (Failure to sue within 30 days.)
Bassett v. *Massman Construction Co.*, 120 F. (2d) 230. (Suit in wrong district.)

2. Petitioner has no standing in this Court or any Court to sue for personal injuries as his cause of action was assigned to his employer by the compensation order of September 28, 1945.

Both the District Court in the opinion of District Judge Sugarman and the Court of Appeals in the opinion by Judge Frank have held that there was an award and a consequent assignment of the cause of action to petitioner's employer and rejected petitioner's argument as to procedural defects in the award. Judge Frank said in the opinion of the Court of Appeals, after holding that the statute provided the exclusive method of securing judicial review of an award:

> "Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit."

Petitioner does not show in any way or degree wherein either the District Court or the Court of Appeals was in error in holding the award to be proper. He merely poses an inquiry to this Court as to what an award is with-

out seriously questioning the validity of the award or indeed arguing the point either way. Inasmuch as there has been an award and that award has been upheld by two courts, petitioner's cause of action, by virtue of 33 U. S. C., 933(b), was assigned on September 28, 1945 to petitioner's employer, and by subrogation under 33 U. S. C. 933(i), to petitioner's employer's insurance carrier.

Since September 28, 1945, therefore, the within action for personal injuries has belonged to either Northern Dock Company or the Travelers Insurance Company. When petitioner sued the vessel and the three respondents herein on June 12, 1952, he was legally disabled from doing so and despite all the activity in the case since that date he is still so disabled. Consequently, there is and can be no controversy between the parties to the above action as to liability for petitioner's personal injuries.

3. Neither the lower courts nor this Court has any power to rule on questions adversely affecting persons not parties to this suit.

Neither the petitioner's employer, Northern Dock Company, nor the Travelers Insurance Company are parties to this suit, yet petitioner seeks to have either or both reassign the cause of action for personal injuries (previously assigned to the employer by the award of September 28, 1945) to him or to compel either or both of said companies to act as trustee for the purpose of prosecution of his claim for personal injuries. Such relief would be repugnant to due process.

Petitioner has mistaken his remedy. Any relief against Northern Dock or the Travelers should be made the subject of a new and separate proceeding against these parties. Petitioner has erroneously annexed his request for such relief to this usurped cause of action for personal injuries.

4. Petitioner's laches has prevented him from obtaining any of the relief he seeks.

The issue of laches is not the laches of petitioner in commencing the suit at bar, for in truth, petitioner could not be guilty of laches in commencing a personal injury suit to which he had no legal right. The real issue here is petitioner's failure not only to pursue his remedy for judicial review of an administrative award under 33 U. S. C. Section 921, but petitioner's laches in making claim for the first time on October 30, 1953 against the Northern Dock Company and the Travelers Insurance Company. This was over eight years after the award and sixteen months after the filing of the libel for personal injuries on June 12, 1952.

Consequently, whether petitioner brought this action for personal injuries within any statute for negligence or unseaworthiness, is wholly irrelevant, for petitioner had no cause of action to bring. The issue, as indicated, is whether he raised his request for relief against the Northern Dock Company and the Travelers Insurance Company in time. As shown in Point 3, that question should be resolved in a proceeding brought against those parties for the relief asserted and not in this action for personal injuries.

On the record, however, petitioner's laches is manifest. The award was made September 28, 1945. The action for personal injuries was commenced June 12, 1952. Not until October 30, 1953 did petitioner for the first time raise the point that the Travelers Insurance Company or the Northern Dock Company was a trustee or requested the relief of reassignment of the cause of action. Under the circumstances and without any plea before the Court of Appeals for an opportunity to excuse his delay, the Court of Appeals was quite justified in deciding on the equities that petitioner had slept on his rights after so long a period. It was not until reargument before the Court of Appeals that petitioner sought to plead facts excusing his delay and

showing lack of prejudice to the respondents, and even at that late date and even before this Court on this petition, petitioner has not enumerated what these exceptional circumstances might be. Seeking very broad equity relief petitioner should not trifle with this Court or the lower courts in asking for opportunities to excuse his laches without presenting those explanations to both the Court of Appeals and this Court.

5. There is nothing, no justification in the opinions below, in case law, the Longshoremen's Act or any practical administration thereof for the broad relief petitioner seeks.

Even assuming that petitioner may reach this Court on a cause of action which does not belong to him and which is not for the equity relief sought against Northern Dock Company and the Travelers Insurance Company, and even assuming that relief may be granted petitioner against persons not parties to this proceeding, and even assuming that petitioner has not been guilty of laches, the question of whether or not there can be a reassignment is not before this Court, nor is the question before this Court of any trustee relationship between petitioner and Northern Dock Company or the Travelers Insurance Company. The Court of Appeals in its opinion and contrary to petitioner's contention expressly did not decide the point, saying on page 20-a of petitioner's Appendix:

> "We do not, however, need to decide this issue, for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovering from a third party."

Even assuming that this was not a dicta, there is nothing in the Longshoremen's Act to support petitioner's plea for such relief. Such relief should not be granted apart from the Longshoremen's Act. Other Courts of Appeal have felt

themselves completely circumscribed by the provisions of the Longshoremen's Act.

In *Associated Indemnity Corporation* v. *Marshall*, 71 F. (2d) 235 (1934) Ninth Circuit, discussing Section 921 (b) as a form of appeal the Court said (p. 236):

> "* * * Although in form not an appeal, a proceeding to set aside the award is somewhat analogous to an appeal; * * *. * * * Appellants argue, however, that since these proceedings are in equity, and are not attacks on decrees or judgments of a court, the chancellor exercising the flexible powers of equity should do full and not partial justice. But the remedial powers of the court are only those which are conferred by the statute and are strictly confined to the suspension or setting aside of the order."

The Court of Appeals for the District of Columbia employed similar reasoning and language in rejecting an appeal to its equity powers in *Shugard* v. *Hodge*, 89 F. (2d) 796 (1937), where the claimant had moved against the award believing himself to be permanently totally disabled instead of, as the Deputy Commissioner found, temporarily totally disabled, claiming also that he was not represented by counsel. The Court said that the lower court was without jurisdiction to hear and determine the case, because suit was not begun until more than thirty days after the award became final. The Court went on to say (pp. 797-798):

> "Although the appellant does not deny the application of these principles of the law in relation to the case, he urges the court to apply broad and liberal principles of equity to the case in order to save him from the consequences of delays for which he does not feel responsible. * * *
>
> It is with regret that we fail to find any authority for such a course. The right which the appellant seeks is of statutory origin and definition, and the granting of it is limited and restricted by statutory rules. The provisions relating to the time within which the claimant

> shall present and prosecute his claim are essential parts of the procedure. The court accordingly cannot revive a claim when barred by the limitations contained in the act."

As a practical matter, the granting of such relief would be unworkable because it would replace the assignee's judgment with that of the Court. In the instant case it is clear that after almost ten years since the accident occurred, neither the employer nor the carrier have any interest in commencing an action against any of the respondents. They may reason, as indeed the compensation doctors found, that the injuries were trivial, and it would be uneconomical to commence suit. They may reason that liability could not successfully be established in this case. They may now feel that as to The Norwegian Shipping and Trade Mission and Kerr Steamship Company, who have no connection or relationship with petitioner's employer, Northern Dock Company, respondent Hamilton Marine Company, or The Travelers Insurance Company, that petitioner's laches or their own laches would preclude bringing any action. They may, indeed, as petitioner contends, have taken advantage of the provisions of the Act. In doing so, however, they are doing no more than this Court suggested an employer might do to protect itself against third party suits, when in the case of *American Stevedores* v. *Porello*, 330 U. S. 446, this Court, in referring to American Stevedores, Inc., commented:

> "* * * American, in the usual circumstances of this case, could have protected itself by controverting the employee's right to receive compensation. In this way it would probably have forced an award and the consequent assignment of the right of action to itself" (p. 455).

Consequently, if Northern Dock Company and its carrier "forced" an award here, they did no more than the statute permits and, as the Supreme Court suggests, is permissible.

Petitioner's whole argument is erroneously pervaded with the notion that a decision to accept compensation under an Act provided by Congress for the longshoremen's benefit is one detrimental to the longshoremen's interests.

6. Characteristics of an award.

Petitioner asks this Court to define for him what an award is. The Court of Appeals and the District Court have already answered his question and Title 33 U. S. C. Section 919, contains the complete procedure for obtaining an award.

CONCLUSION

The petition for certiorari should be denied because petitioner has brought the wrong proceeding against the wrong parties at the wrong time.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Respondents,
The S/S Hoegh Silvercloud,
Oivind Lorentzen and Kerr
Steamship Company, Inc.

FRANCIS X. BYRN,
On the Brief.

Libelant's Exhibit 2. 1

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

SECOND COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. BLAZEY CZAPLICKI, Claimant, against NORTHERN DOCK COMPANY, Employer, TRAVELERS INSURANCE COMPANY, Insurance Carrier.	Compensation Order Award of Compensation 2 Case No. 65-438

Such investigation in respect to the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

FINDINGS OF FACT: 3

That on the 6th day of September, 1945, the claimant above named was in the employ of the employer above named at Hoboken, in the State of New Jersey, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation

Libelant's Exhibit 2.

under said Act was insured by Travelers Insurance Company; that on the said day the claimant herein while performing service as a longshoreman for the employer and engaged in unloading cargo from the "H. Silvercloud" which was afloat in New York Harbor, sustained personal injury resulting in his disability when, as he was ascending a flight of steps on the deck to reach a catwalk leading to a hatch, the steps gave way and he fell about five feet in consequence of which he sustained a contusion and abrasion of the right leg, contusion and abrasion of the left elbow, contusion of the left side of the chest, and contusion and hematoma of the left hip; that written notice of the injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $1755.00; that as a result of the injury the claimant was wholly disabled from September 7, 1945 to September 27, 1945, on which date he was still so disabled, and he is entitled to 2 weeks' compensation at $22.50 per week for such temporary total disability (3 weeks' disability less 1 week waiting period); that the compensation for temporary total disability amounts to $45.00; that the employer and carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

AWARD:

That the employer, Northern Dock Company, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant compensation, as follows: 2 weeks at $22.50 per week for temporary total disability from September

14, 1945 to September 27, 1945, inclusive, in the amount of $45.00, and shall continue payments thereafter in bi-weekly installments at $22.50 per week until disability shall have ceased or otherwise ordered.

Given under my hand at 641 Washington Street, New York City, this 28th day of September, 1945.

LOUIS G. SCHWARTZ
Deputy Commissioner
Second Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each, as follows:

Mr. Blazey Czaplicki, 259 4th Street, Jersey City, N. J.
Northern Dock Company, Pier 3, River Street, Hoboken, N. J.
Travelers Insurance Company, 60 Park Place, Newark, N. J.

D. B. O'KEEFE,
Claims Examiner.

Mailed September 28, 1945.

10

Respondent Hamilton's Exhibit A

MEMORANDUM FOR THE FILE

September 28, 1945

Re: Blazey Czaplicki — File #65-438
Northern Dock Co.
Inj. 9/6/45

Compensation payments have been withheld in this case by the carrier because of the possibility of the injury having been caused by the negligence of a third party.

11 The claimant called on September 27, 1945, and the provisions of Section 33 (b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.

He filed a Claim for Compensation and a formal order will be issued accordingly.

D. B. O'KEEFE,
Claims Examiner.

DBO/ERC

12

Letter of September 25, 1945, from Claims Examiner O'Keefe to Petitioner. 13

65-438

Carrier's No. B-5981165
September 25, 1945.

Mr. Blazey Czaplicki,
259 4th Street,
Jersey City, N. J.

Re: Blazey Czaplicki
Northern Dock Co.
Inj. 9/6/45

Dear Sir:

Your employer's insurance carrier has advised this office that compensation payments are being withheld in your case pending election to take compensation or to sue a third party. 14

If you intend to accept compensation, you should file a claim on the enclosed form U.S.-203 and a formal order will be issued. Section 33(b) of the Act provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

If, on the other hand you elect to sue the third party, you should file an Election to Sue on the enclosed form U.S.-213 in order to protect your future interests in the event that you should be unable to recover from the third party the amount that you would be entitled to under the Compensation Act. 15

Very truly yours,

D. B. O'Keefe,
Claims Examiner.

DBO/ERC
Enc.

'A compensation order shall become effective when filed in the office of the deputy Commissioner as provided in section 919 of this chapter.' The alleged award of May 3, 1932, was not filed in conformity with the aforesaid statute; hence it did not become effective as an award. In the absence of fraud, the conduct of the parties in their subsequent dealings cannot supplant the statutory requirement of filing so as to make a compensation order effective as against the rights of claimant here, since the object and spirit of the act indicate that it should be construed liberally toward the claimant when to do so would not conflict with sound logic. Again, the Compensation Act (U. S. C. title 33, section 919, subd. (e), 33 U. S. C. A. 919 (e), provides that a copy of the award 'shall be sent by registered mail to the claimant and to the employer at the last known address of each.' This was not done as to the alleged award of May 3, 1932. It follows, therefore, that the document did not take on the dignity of an effective award. * * *"

This decision was affirmed in 85 F. 2d 625 (3 Cir., 1936).

Secondly the alleged "award" does not have the element of "finality." It is at most an intermediate order. It merely provides for payments for the continuing "temporary total disability."

In the file of the Compensation Commission there is a form letter dated December 5, 1945, three months after the accident in which libelant was advised that the medical reports filed with the commission indicated libelant had no further disability. On this letter appeared the notation written in (R. 74):

"CP. 3/11. Says working only a day or two a week pain left hip."

This letter and the notation as well as the language of the order of September 28, 1945, establish that the order with the alleged "award" dated September 28, 1945 was little more than a temporary or interlocutory order which awaited the completion of treatment before the claimant's rights could be finally determined. As Justice Reed pointed out, the purpose of Congress in amending 33 U. S. C. A. §933(b) and limiting its operation to an "award" was to give the injured longshoreman time to think and to avoid the force of the very economic pressure which was applied here to make libelant decide at a time when he was in no position to make a choice.

Therefore, while libelant does not attack the proceedings in the commission directly or collaterally, he does raise the issue whether or not the order of September 28, 1945 contained an "award" within the meaning of 33 U. S. C. A. §933(b) so as to constitute an assignment. Based upon the failure to meet the provisions of 33 U. S. C. A. §919, which sets up the procedure for the making of an "award," the lack of finality in the alleged "award," and the Congressional purpose in amending 33 U. S. C. A. §933(b), libelant contends that no such "award" was entered in this case, and therefore no assignment occurred.

The "award" did not constitute such an "award" as would assign libelant's cause of action for the reasons stated above. However even if it is held to have caused such an assignment, the liberal interpretation of the LHWCA, the trust relationship created between the employer and employee by the assignment in the libelant's cause of action and the equitable concepts applied in admiralty require the court to afford some protection to the injured employee to protect his interest in his cause of action against the third-party tortfeasors.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment and decree of the court below should be reversed, and the case remanded for trial.

Respectfully submitted,

NATHAN BAKER
Of counsel and Proctor for Petitioner.

BAKER, GARBER & CHAZEN, Esqs.
Of Counsel

BERNARD CHAZEN, Esq.
On the Brief